

SERVED: April 26, 2002

NTSB Order No. EA-4966

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of April, 2002

KURT M. LEPPING,

Applicant,

v.

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Respondent.

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) Docket 279-EAJA-CP-68
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OPINION AND ORDER

Applicant (the respondent in the underlying action) has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William A. Pope, II, served on May 18, 2001.¹ The law judge denied, in full, applicant's request for fees and expenses. We affirm that decision.

The law judge fully set forth the legal standards relevant here to EAJA recovery, and we will not repeat them. Briefly,

¹ The initial decision is attached.

although EAJA recovery requires that a respondent has prevailed in the underlying litigation, prevailing is not enough. No recovery is authorized if the Administrator was substantially justified in bringing and pursuing the action. Applicant claims that the Administrator was not substantially justified in either bringing the action or in continuing it based on allegedly unreliable testimony. We find no reasonable basis in the record for such a conclusion.

Applicant was charged with violating sections 91.13(a) and 91.119(c) of the Federal Aviation Regulations (FAR, 14 CFR Part 91) in flying within 500 feet of persons, vehicles, and structures when not necessary for takeoff or landing. He had been hired to fly a seaplane to pick up a bride and groom following their wedding reception at Lake Lucille Lodge, on the shore of Lake Lucille in Wasilla, Alaska. John Elgee, an FAA inspector, lived on the lake near the lodge. He testified that the lake was long enough and wide enough that there was no need to fly within 500 feet of the shore and that the responsible pilot would land down the middle of the lake and then taxi to the lodge's dock. Although off duty at the time, he was so concerned with applicant's airborne maneuvers close to the shore that he got his credentials, went to the lodge, had a spirited discussion with the applicant, and later participated in the Administrator's investigation.²

² There was considerable discussion about what "necessary for takeoff or landing" in FAR section 91.119(c) meant. There should (continued...)

The law judge heard testimony from Mr. Elgee, as well as applicant and various wedding attendees. He ultimately rejected the section 91.119(c) allegations as they concerned applicant's airborne actions. The law judge found that applicant had violated the cited sections, not in his flight, but in his step-taxiing on the lake after landing. On appeal, we dismissed that finding. We held that applicant had not received adequate notice that this was an aspect of the complaint that he would have to defend. (We did not directly reach the question of whether applicant had violated section 91.119(c) while flying; the Administrator had not appealed the law judge's decision.)

As applicant acknowledges, the law judge's rejection of Mr. Elgee's testimony is not, in itself, sufficient to find the Administrator not substantially justified. We have carefully reviewed the record and conclude that, at each step, the Administrator had sufficient reliable evidence to prosecute the matter. Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

There is no basis for the finding sought by applicant that the Administrator should have known that Mr. Elgee's testimony

(continued...)

have been no question. Applicant's definition would have an absurd result. See Administrator v. Kittelson, NTSB Order No. EA-4068 (1994) (respondent could not simply choose a takeoff route and call it a necessary one; it must be a reasonable, appropriate choice, or the regulation has no meaning). The 500-foot requirement does not refer to altitude but to measured distance in any direction from persons, vehicles, etc.

would be found to be unreliable and/or untrustworthy.

Applicant's attempt to portray him in that light was not convincing. His only witness to that effect was a gentleman against whom the Administrator had a pending complaint, with Mr. Elgee the investigating officer. Similarly, concerns of the wedding participants that Mr. Elgee should not have interrupted the party do not support a finding that Mr. Elgee's testimony could not be relied on. Indeed, Mr. Elgee's supervisor testified that inspectors were encouraged to, in effect, do business on their own time.

In our view, Mr. Elgee's testimony that respondent was operating the aircraft dangerously close to the shore in violation of the regulations was ample to support the allegations of the complaint and, therefore, sufficient for a finding that the Administrator was substantially justified. There was no other more persuasive evidence that would have led a reasonable person to discontinue the investigation or withdraw the complaint. Despite the fact that the law judge ultimately ruled to the contrary, the Administrator had no reason to believe applicant over Mr. Elgee.³ Applicant's photographic evidence did not compel a different result because they are not definitive evidence of applicant's flight path prior to landing. Furthermore, there was testimony from other eyewitnesses

³ It is clear that what applicant calls Mr. Elgee's revised accounts are merely clarifications, and do not undermine his basic testimony.

(uncommented on by the law judge when he made his credibility decision) that applicant flew near or over the lodge and close by the shore. Tr. at 193, 198, 202, 233, 241. Finally, the Administrator's failure to discount Mr. Elgee's statements in favor of allegedly inconsistent information in documents prepared by an investigator-in-training is also not sufficient grounds to find the Administrator not substantially justified in pursuing the case when she had an FAA inspector as an eyewitness. Applicant's suggestion that the Administrator did not make that investigator-in-training available as a witness because she would testify to Mr. Elgee's inconsistent statements is also unpersuasive. The Administrator had no actual notice of applicant's desire to question this witness at the hearing. In the absence of that knowledge, it was perfectly reasonable for the Administrator to conclude that, because the actual witnesses were available, there was no reason to offer someone to testify to hearsay.

Contrary to applicant's contention, the Administrator did not ignore witnesses. This is, instead, a classic credibility case in which the Administrator was substantially justified in relying on the eyewitness account of one of her inspectors as the basis for a complaint.

Applicant also argues that, when the Administrator abandoned the theory that he had flown too close to the shore in favor of a theory that he had step-taxied too close, this became a separate basis for an EAJA award. While this argument has some initial

appeal, we think the facts here are such that they do not justify an EAJA award. First, it is clear from the transcript that the Administrator, rather than abandoning one theory in place of another, added the second theory only at the hearing, and reluctantly, upon repeated questioning and interest from the law judge. Second, although we ultimately concluded that applicant did not have sufficient notice of the violation found by the law judge, this conclusion was not so clear cut or obvious that we must find that the Administrator was unreasonable in law in arguing it at the hearing. Third, this was not a significant portion of the adversarial proceedings so as to qualify for EAJA relief. Applicant has made no attempt to quantify how many hours, and what expenses, might be apportioned to that claim, and we expect the answer is few. Indeed, the issue only arose at the tail end of the hearing, and the appeal brief addressed the issue in only a few pages. (Applicant's EAJA brief at 16 notes that "virtually all of Applicant's attorney time spent at the hearing -- as well as before it -- was spent defending the flying allegations...virtually no time was spent defending the unstated step-taxi allegation....".)

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.